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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 589

ORLEANS PARISH SCHOOL BOARD, *et al.*,

Appellants,

—v.—

EARL BENJAMIN BUSH, *et al.*,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA, NEW ORLEANS DIVISION

MOTION TO AFFIRM

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Appellees move to affirm the judgment below on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

Questions Presented

For the purposes of this motion, appellees adopt the questions presented by appellants at pages 3-4 of their Jurisdictional Statement.

Statement of the Case

The complete history of this protracted litigation, including a full statement of the proceedings giving rise to

this appeal, is set out in the opinion of the court below. See Appellants' Jurisdictional Statement, Appendix A (pp. 17 *et seq.*).

Reasons for Granting the Motion

Appellants, the Orleans Parish School Board, four of its five elected members and the Parish Superintendent of Schools, formally tender five questions on this appeal. Although the validity of "a packet of segregation measures" has been variously drawn in question by four of the five questions presented, appellants nonetheless concede that "all of the[se] statutes and resolutions . . . are patently unconstitutional and pose no substantial constitutional question" (Juris. Statement, pp. 10, 11). Such concession, appellees agree, is compelled by *Brown* v. *Board of Education*, 347 U.S. 483; *Id.*, 349 U.S. 294, 298; *Cooper* v. *Aaron*, 358 U.S. 1; *United States* v. *Louisiana*, 29 U.S. L. Week 4061 (U.S. December 12, 1960); *Aaron* v. *McKinley*, 173 F.Supp. 944 (E.D. Ark. 1959), affirmed *sub nom. Faubus* v. *Aaron*, 361 U.S. 197; *James* v. *Almond*, 170 F.Supp. 331 (E.D. Va. 1959), dismissed 359 U.S. 1006; *James* v. *Duckworth*, 170 F.Supp. 342 (E.D. Va. 1959), affirmed 267 F.2d 224 (4th Cir. 1959), cert. denied 361 U.S. 835.

"However," appellants assert, "the denial of the District Court of Appellants' motion to allow it to continue the operation of segregated schools in the Parish of Orleans, while the State of Louisiana pursues its attempt to assert the supremacy of its sovereignty over the Federal Courts, does present questions which are so substantial as to require plenary consideration" (Juris. Statement, p. 11). Appellees submit that this question has already been settled by this Court in *Cooper* v. *Aaron*, *supra*, and therefore, is,

so devoid of merit that the decision below on this aspect of the case should also be allowed to stand without plenary consideration. Moreover, appellees adopt the following section of the opinion below (Juris. Statement, Appendix A, pp. 37-38); and we suggest that it fully disposes of the argument renewed here by appellants:*

MOTION TO VACATE

The last matter presented for our consideration is the School Board's plea that we postpone the effective date of the order compelling desegregation of first grade classes by November 14. The Board suggests that local conditions are so disturbed that orderly compliance is difficult at this time, especially in view of its own precarious legal and financial position. All this may be true, but the history of this litigation leaves some doubt about the advisability of further postponing an inevitable deadline. Indeed, the date originally set for making a start in the direction of desegregation has already been postponed two months and it is far from clear that this delay improved conditions. But, in any event, though we be persuaded of the School Board's good faith, there can be no question of delaying still longer the enjoyment of a constitutional right which was solemnly pronounced by the Supreme Court of the United States more than six years ago. As that Court itself said in rejecting a similar plea in Cooper v. Aaron, supra, 15-16;

> "One may well sympathize with the position of the Board in the face of the frustrating conditions which have confronted it, but, regardless of the Board's good faith, the actions of the other state agencies responsible for these conditions compel us

* See also *Bush* v. *Orleans Parish School Board*, Civ. No. 3630, E. D. La., December 21, 1960.

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to reject the Board's legal position. Had Central High School been under the direct management of the State itself, it could hardly be suggested that those immediately in charge of the school should be heard to assert their own good faith as a legal excuse for delay in implementing the constitutional rights of these respondents, when vindication of those rights was rendered difficult, or impossible by the actions of other state officials. The situation here is in no different posture because the members of the School Board and the Superintendent of Schools are local officials; from the point of view of the Fourteenth Amendment, they stand in this litigation as the agents of the State.

"The constitutional rights of respondents are not to be sacrificed or yielded to the violence and disorder which have followed upon the actions of the Governor and Legislature. As this Court said some 41 years ago in a unanimous opinion in a case involving another aspect of racial segregation: 'It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution.' *Buchanan v. Warley*, 245 U.S. 60, 81. Thus, law and order are not here to be preserved by depriving the Negro children of their constitutional rights. The record before us clearly establishes that the growth of the Board's difficulties to a magnitude beyond its unaided power to control is the product of state action. Those difficulties as counsel for the Board forthrightly conceded on the oral argument in this Court, can also be brought under control by state action."

CONCLUSION

For the foregoing reasons, the questions presented by appellants are clearly unsubstantial and this motion to affirm should be granted.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960.

United States of America, *v.* State of Louisiana, et al.	Motions For Stay.
Earl Benjamin Bush, et al., *v.* Orleans Parish School Board, et al.	
Harry K. Williams, et al., *v.* Jimmie H. Davis, et al.	

[December 12, 1960.]

PER CURIAM.

These are motions for stay of an injunction by a three-judge District Court which nullified a series of enactments of the State of Louisiana. The scope of these enactments and the basis on which they were found in conflict with the Constitution of the United States are not matters of doubt. The nub of the decision of the three-judge court is this:

> "The conclusion is clear that interposition is not a constitutional doctrine. If taken seriously, it is an illegal defiance of constitutional authority." *United States* v. *Louisiana*, — F. Supp. —.

The main basis for challenging this ruling is that the State of Louisiana "has interposed itself in the field of public education over which it has exclusive control." This objection is without substance, as we held, upon full consideration, in *Cooper* v. *Aaron*, 358 U. S. 1. The others are likewise without merit.

Accordingly, the motions for stay are denied.